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No. _____

IN THE

Supreme Court of the United States

October Term, 1981

GEORGE A. CHESTNUTT, JR., WARREN K. GREENE, STANLEY L. SABEL, AMERICAN INVESTORS CORPORATION, and CHESTNUTT CORPORATION

Petitioners,

v.

ROSALIND FOGEL AND GERALD FOGEL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners,

v.

ROSALIND FOGEL AND GERALD FOGEL,

Respondents.

QUESTIONS PRESENTED

1. Whether a private right of action may be implied under the Investment Company Act of 1940?

2. Whether principles of waiver or the law of the case doctrine properly excuse a lower federal court, bound to apply the law as it exists at the time of decision, from fully considering the effect of the change in the law made by this Court in *Cort* v. *Ash*, 422 U.S. 66 (1975), and succeeding cases?

3. Whether the existence of an implied private right of action under a federal statute is jurisdictional, or sufficiently analogous to a jurisdictional question, so that it may be raised at any point in the course of litigation?

PARTIES TO THE PROCEEDINGS

Certain of the defendants below are petitioners herein, George A. Chestnutt, Jr., Warren K. Greene, Stanley L. Sabel, American Investors Corporation and its predecessor, Chestnutt Corporation.* Defendants Frank Fowler, Jr., Richard W. Radcliffe, Francis L. Veeder (who were never served with process), and American Investors Fund, Inc., did not appeal below. The plaintiffs below, Rosalind and Gerald Fogel, are respondents herein.

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* Pursuant to Rule 28.1 of the Rules of this Court petitioner American Investors Corporation states that it owns 82% of the common stock of Cascade Airways, Inc. It has no other affiliates or subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this action on December 17, 1981.

OPINIONS BELOW

The Court of Appeals for the Second Circuit has issued two opinions in this action. The more recent opinion ("*Fogel II*") is officially reported at 668 F.2d 100 and is printed in the separately bound appendix to this petition. (A.2)[1] The opinion of the United States District Court for the Southern District of New York from which that appeal was taken is officially reported at 493 F. Supp. 1192 (S.D.N.Y. 1980), and is printed in the appendix. (A.39).

The first opinion of the Court of Appeals in this action ("*Fogel I*") is reported at 533 F.2d 731 (2nd Cir. 1975), *cert. denied*, 429 U.S. 824 (1976), and is printed in the appendix. (A.77). The opinion of the United States District Court for the Southern District of New York from which that appeal was taken is reported at 383 F. Supp. 914 (S.D.N.Y. 1974), and is printed in the appendix. (A.121).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was entered on December 17, 1981. A timely petition for rehearing was denied on February 22, 1982. This petition for certiorari was filed within ninety days of that date.[2] This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

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1. The order of the Court of Appeals denying rehearing is also printed in the appendix. (A.1).

2. The 90-day period set forth in 28 U.S.C. § 2101 actually expired on Sunday, May 23, 1982. Accordingly, under Rule 29 of the Rules of this Court, this petition may timely be filed on Monday, May 24, 1982.

STATUTES INVOLVED

Sections of the Investment Company Act ("ICA"), 15 U.S.C. §§ 80a-1, 80a-10(a), 80a-17(e)(1), 80a-17(h), 80a-17(i), 80a-35, 80a-35(a), 80a-35(b), 80a-36 and 80a-43, are set forth in a statutory addendum ("S.A.") at the end of this petition.

STATEMENT OF THE CASE

On July 11, 1968, a derivative action was filed by respondents Rosalind and Gerald Fogel, shareholders of the American Investors Fund, Inc. ("Fund"), against petitioners, the Fund's investment advisor, American Investors Corporation (formerly Chesnutt Corporation) ("Advisor"), George A. Chesnutt, Jr., Warren K. Greene, and Stanley L. Sabel, all of whom were directors of both the Fund and the Advisor ("Affiliated Directors"), and John Currier, a director of the Fund.[3] Respondents contended that petitioners had violated a duty imposed by the Investment Company Act of 1940 ("ICA")[4] by failing to make an adequate disclosure to the unaffiliated directors of the Fund about the possibility that the Fund might be able to "recapture" some of the brokerage commissions paid on its market transactions.

Recapture is a process by which a fund's advisor, as a concession from securities brokers handling its market transactions, may be able to recover some portion of the brokers' commissions. Under stock exchange rules, direct payment of recaptured amounts to the Fund was impossible, but through the device of "give-ups" a mutual fund advisor could instruct brokers to pay over a portion of the commissions paid by its mutual fund to a chosen broker. Respondents alleged that recapture was available to the Fund *via* the formation of a brokerage subsidiary of the Advisor, which in turn could have become a member of the National Association of Securities Dealers and thereby positioned itself to receive commission "give-ups" from other brokers.

3. The plaintiffs-appellees below are respondents here. The defendants-appellants below, with the exception of John Currier, filed this petition. Currier has filed a separate petition.

4. 15 U.S.C. § 80a-1 et seq.

Following a non-jury trial on the issue of liability, the district court dismissed the complaint in October 1974. (A.121). The court held that neither the Fund nor the Advisor could legally have recaptured commissions by forming a brokerage subsidiary and that, as a result, respondents had failed to prove that petitioners could have secured any return for the Fund via recapture of brokerage commissions. (A.131-134).

Respondents appealed, and in December of 1975 in *Fogel I* the court of appeals reversed, holding that the Advisor could have lawfully recaptured certain commissions on behalf of the Fund (A.109-118); that the affiliated directors had failed to make a full disclosure to the unaffiliated directors regarding that possibility (A.101-109); and that the failure to do so violated duties imposed by the ICA.[5] (A.99-100, 108-109). The court of appeals remanded for a determination of damages in accordance with its opinion. (A.118-120).

On remand, the district court referred the damage issues to a magistrate, who found damages of $349,013.04, plus interest, on October 31, 1978. (A.63). The district court rejected the magistrate's findings in June, 1980, finding petitioners jointly and severally liable for substantially increased damages which totalled, with interest, $3,919,220, plus costs. (A.39-62).

On appeal in *Fogel II*, petitioners attacked the damage award and, relying on this Court's recent decisions changing the law with respect to implied rights of action, challenged the existence of such an implied right under the ICA. In its *Fogel II* opinion, the court below affirmed the damage award and held that the implied private right of action issue was not a jurisdictional one that could be raised at any time. (A.7-12). The court also stated that petitioners should be barred from receiving full consideration of the impact of this Court's recent decisions about implied rights of action by the 1973 pretrial order entered before the liability trial which resulted in dismissal of the complaint (A.12-14), and by application of the law of the case doctrine. (A.14-21). The court claimed—erroneously we submit—that it

5. Petitioners thereafter sought certiorari from this Court, but the petition was denied. Chestnutt Corp. v. Fogel, 429 U.S. 824 (1976).

had discretion to ignore this Court's recent decisions changing the law relating to implied private rights of action between *Fogel I* and *Fogel II*. (A.13-21).[6] In the course of deciding not to exercise its discretion to relieve petitioners of the preclusive effect of the waiver and the law of the case doctrine, the court below gave "serious consideration" (A.14) to petitioners' arguments that the change in the law compelled a conclusion that there is no implied right of action under the ICA. However, it rejected those arguments, concluding that "it seems to us highly unlikely that Congress intended that . . . injured investors should have no recourse in a federal court" . . . [although] we recognize that the question of the existence of a private cause of action under the ICA has become more debatable than we or the [petitioners] thought in 1975. . . ." (A.21).

BASIS FOR FEDERAL JURISDICTION

Jurisdiction of this action in the District Court was predicated upon the ICA, the Investment Advisers Act, and the Securities Exchange Act of 1934.[7]

REASONS FOR GRANTING THE WRIT

In 1975, this Court "unanimously decided to modify its approach to the question whether a federal statute includes a private right of action." *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, No. 80-203, Slip op. p. 23 (May 3,1982). As the Court there explained, "[t]he increased complexity of federal legislation and the increased volume of federal litigation strongly supported the desirability of a more careful scrutiny of legislative intent than [*Texas & Pac. R. Co.* v.] *Rigsby* [241 U.S. 33

6. Whether an implied private right of action exists under the ICA was not actually considered in *Fogel I*, but the court below stated that the question had been decided by necessary implication on the first appeal. (A.14).

7. The issues presented by the allegations under the Investment Advisers Act and the 1934 Act were not litigated below, and the lower courts did not predicate petitioners' liability on them.

(1916)] had required." *Id.* The instant case presents important substantive and procedural issues arising directly from this Court's changed approach to questions about implied private rights of action.

The substantive issue is whether, as the court below held, there is an implied private right of action for damages under the ICA to enforce the fiduciary duties imposed by that statute. The court below failed to examine that issue with anything remotely approaching the scrutiny mandated by *Cort* v. *Ash*, 422 U.S. 66 (1975), and its progeny—particularly *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979). There is also a conflict among the circuits concerning implied rights of action under the ICA which this Court should resolve.

The procedural issues, broadly summarized, relate to whether, given the change in the law with respect to private rights of action generally, it was appropriate for the court below to hold, as it did, that a detailed review of the propriety of implying a private right to enforce the ICA could be avoided through application of principles of waiver or on a narrow view of the law of the case doctrine. Specifically, we contend that that holding was wrong for two reasons.

First, this case was originally tried and first appealed during the period when *Rigsby* and its principal securities law offshoot, *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), held sway. Because this court has abandoned the approach of those decisions, the implied-right-of-action issue was properly raised when it was fully briefed and argued on the second appeal, *i.e.*, the appeal heard in 1981 from the $4 million district court damage award. Given the significant change in the applicable law, neither a party's waiver nor the law of the case doctrine may appropriately be invoked to bar application of the new rule of law to a pending case. There was no discretion in the court below to give the issue less than full consideration, and by holding otherwise the court ignored its obligation to apply changes in the law to a pending case, notwithstanding a waiver or a contrary holding during prior proceedings in such a case. *Cort* v. *Ash*, *supra*, 422

U.S. at 76-77; *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711-16 (1974); *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268, 281-82 (1969). *See also, Crane Co.* v. *American Standard, Inc.*, 603 F.2d 244, 248, n.10 (2nd Cir. 1979).

Second, and more broadly, we contend that the issue of whether a private right of action may be inferred from a federal statute is in fact, or should properly be treated as procedurally analogous to, a question of jurisdiction which may be raised at any time during a lawsuit. The approach adopted by the court below invites precisely the type of adverse consequences that the rule which holds jurisdictional questions non-waivable seeks to avoid: imposition by the federal courts of liabilities not authorized by Congress or the Constitution. There is considerable confusion in the lower courts and, indeed, among decisions of this Court on that issue. It is particularly important that this confusion be resolved to the end that the new rule requiring specific Congressional intent to authorize implied private rights of action will be consistently applied in all pending cases.

I.

THE DECISION OF THE COURT BELOW THAT IT WAS PROPER TO IMPLY A PRIVATE RIGHT OF ACTION UNDER THE ICA CONFLICTS WITH DECISIONS OF THIS COURT AND OF THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

There is no question that the court below was bound to consider, under the principles of *Cort* v. *Ash* and subsequent cases,[8] whether there is an implied private right of action under the ICA.

8. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith v. Curran, No. 80-203, Slip op. (May 3, 1982); Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981); California v. Sierra Club, 451 U.S. 287 (1981); Universities Research Assn. v. Coutu, 450 U.S. 754 (1981); Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 (1980); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Cannon v. University of Chicago, 441 U.S. 677(1979); Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977).

See, Parts II and III, *infra*, pp. 18-28. *Curran, supra*, was a consolidated opinion of this Court upholding decisions of both the Second and Sixth Circuits that Congress intended such private actions under the Commodities Exchange Act. In the Sixth Circuit case, the court of appeals raised and decided the issue *sua sponte*. *Curran* v. *Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 622 F.2d. 216, 230 (6th Cir. 1980). This Court then granted certiorari and decided the issue on the merits. This was appropriate given the change in the law accomplished by *Cort* and subsequent cases and the fact that this historic shift began just before the complaint in *Curran* was filed and continued throughout the time that case was pending in the Eastern District of Michigan and the Sixth Circuit.

The court below, presented with the same issue under the ICA, improperly sought to evade its responsibility fully to evaluate petitioners' argument about the change in the law. It suggested that petitioners had waived the issue by not including it as one of their contentions in the 1973 pretrial order entered in the case (A.13-14), and further, that since the question had been decided against petitioners by necessary implication in *Fogel I*, that decision was binding on petitioners as the law of the case.[9] (A.14-21).

The court asserted that it had discretion to consider the issue thoroughly in spite of the alleged waiver and law of the case doctrine.[10](A.13-15). We show below that the court had no such discretion because petitioners' claim was based on a change in the

9. In Parts II and III, *infra*, we demonstrate that this approach itself raises issues worthy of review by this Court.

10. The court stated that "Rule 16 authorizes a district court to modify a pretrial order 'at the trial to prevent manifest injustice.' We assume that a court of appeals has similar power, although the party seeking relief must present a much stronger case since the adverse party has been subjected to the burden of a trial, and a still stronger one when an earlier appeal and extensive proceedings with respect to damages have occurred." (A.13-14). As to the "law of the case," the court stated: "We unhesitatingly accept that, as we stated in *Zdanok v. Glidden Co.*, 327 F.2d 944, 951 (2 Cir. 1964), 'if, before a case in the district court has proceeded to final judgment, a decision of the Supreme Court demonstrates that the ruling on which the judgment would depend was in error, no principle of the law of the case would warrant a failure on our part to correct the ruling.' " (A.14) *Cf.*, Sumner v. Mata, 449 U.S. 539, 547-48 n. 2 (1981), discussed, *infra*, at p. 24.

law. However, conceding for the present that such discretion did exist, its exercise by the court below required, and did in fact involve, an analysis of whether there was a private right of action under the ICA. That analysis, however, was incorrect and incomplete. Specifically, the court below: (1) failed to specify any provision of the ICA from which petitioners' alleged duties concerning the possibilities of recapture were derived; (2) failed to examine whether Congress evidenced any specific intent to authorize shareholders to pursue a private damage action alleging breach of such duties; and (3) failed to recognize that its "nose count" of pre-1975 lower court authority did not support its conclusion that an implied private right of action could be sustained under the ICA on the basis of longstanding recognition by the lower courts and, indeed, that there is a conflict of circuits on that issue. In each instance, the decision below conflicts with decisions of this Court.

A. The Failure to Identify a Statutory Source for Petitioners' Alleged Liability.

Judge Friendly wrote the opinion in *Fogel I* and in *Fogel II* below. *In Fogel I* he repeatedly suggested that the source of petitioners' alleged duties lay in § 36 of the ICA. (A.99-100, 108-109). Section 36 authorized the Securities and Exchange Commission to commence injunctive actions to disqualify persons from further service if they were guilty of "gross misconduct or gross abuse of trust in respect of any registered investment company . . . ." 76th Cong., ch. 686, tit. I, § 36, 54 Stat. 841.[11]

Petitioners accordingly focused their arguments on whether a private right of action could be implied from § 36. In *Fogel II*, Judge Friendly retreated from § 36 (A.19-21); but he did not—and, we submit, could not—point to any specific provision of the ICA that gave rise to the "fiduciary duty to make a full

11. The text of § 36 as originally enacted is set forth in the statutory addendum printed as part of this petition. (S.A. 5). This section was amended in 1970. Investment Company Amendments Act of 1970, Pub. L. 91-547, 84 Stat. 1413. Amended § 36 is also set forth in the statutory addendum (S.A. 5), and is discussed *infra*, at pp.14-15.

disclosure to the independent directors of opportunities available to the fund . . . ." *Id.* The closest the court came to identifying a source for this alleged duty was a statement relating to the ICA's preamble, § 1:

> "In adopting a statute intended as a thorough and pervasive regulation of the investment company industry, in part because of the inadequacies of the 1933 and 1934 Acts 'to cope with the grave abuses and evils that had developed in some quarters in the investment company business', *Brown* v. *Bullock, supra,* 194 F. Supp. at 207, and in the face of the declaration in § 1 [of the ICA], it seems to us highly unlikely that Congress intended that, save for suits to recover short swing profits, § 30(f) [of the ICA], enforcement should be solely the task of the SEC and of the criminal law, and that injured investors should have no recourse in a federal court." *Id.*

This is tantamount to a suggestion that respondents' claim arises from the ICA as a whole. As such, it is a holding that it is proper to create a "federal common law" of corporations. Although the author of the opinion below is on record elsewhere as favoring such a development, *see,* Friendly, *In Praise of Erie and of the New Federal Common Law,* 39 N.Y.U.L. Rev. 383 (1964), this Court has specifically rejected it. *Burks* v. *Lasker,* 441 U.S. 471, 478 (1979); *Santa Fe Industries, Inc.* v. *Green,* 430 U.S. 462, 478-80 (1977).

Alternatively, the holding below may be viewed as an application of the approach followed in *J.I. Case Co.* v. *Borak, supra.* But that approach, too, is a dead letter under this Court's recent decisions. *See, e.g, Curran, supra,* slip op. at 20-24.

This Court has insisted that any liability must be based on particular, substantive provisions of the federal securities laws, not on general policy atmospherics. As stated in *Touche Ross & Co.* v. *Redington,* 442 U.S. 560, 577 (1979), the "source of plaintiffs' rights must be found, if at all, in the substantive provisions of the . . . Act which they seek to enforce. . . . " No such

finding was made below, and surely the preamble to the ICA, § 1, "Findings and Declaration of Policy," 15 U.S.C. § 80a-1, referred to by the court below, cannot provide it.[12]

B. The Failure to Point to Any Specific Evidence that Congress Intended to Authorize a Private Right of Action Under the ICA.

If we were to concede *arguendo* that petitioners breached a duty imposed upon them by the ICA, the court below failed to elucidate any rational basis for concluding that Congress intended to give respondents the right to enforce that duty through a private action in federal court. Under this Court's decisions, assuming that a duty is created by the ICA, whether it is enforceable by private litigation is a wholly different question. *Transamerica Mortgage Advisors, Inc., supra,* 444 U.S. at 18. The court below thus had a separate obligation to determine "whether Congress intended to create the private remedy." *Id.* at 15. This is, of course, "basically a matter of statutory construction." *Id.*

Such analysis must begin with the statutory language itself. *Transamerica, supra,* 444 U.S. at 16; *Touche Ross, supra,* 442 U.S. at 568; *Cannon* v. *University of Chicago,* 441 U.S. 677, 689 (1979); *Santa Fe Industries, supra,* 430 U.S. at 472, quoting *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 197 (1976), quoting *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 756 (1975); *Piper* v. *Chris-Craft Industries, Inc.,* 430 U.S. 1, 24

12. As Judge Rifkind stated thirty-five years ago with respect to §1 of the ICA:

> "The Investment Company Act is a carefully framed statute in which Congress has, with particularity, stated the means and methods, both judicial and administrative, by which its declaration of policy is to be executed. It has not confided in the courts a broad discretion to shape judicially contrived remedies for the mischief it has discovered. Insofar as power is entrusted to the courts under this Act its exercise must, of course, be steered toward the fulfillment of the national policy as declared in [§ 1]. The policy itself, however, when declared in a statute as comprehensive and detailed as this Act, does not authorize the courts to fashion sanctions withheld by Congress."

Doyle v. Milton, 73 F. Supp. 281, 284-5 (S.D.N.Y. 1947).

(1977). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Petitioners submit that a reading of the ICA, *in toto*, suggests that § 36 is the only possible source from which to derive the duty they are supposed to have breached. For this reason, petitioners contended below that, in light of the standards of this Court's recent decisions, it was inappropriate to imply a private right of action to enforce that section.[13] Certainly none of the other provisions of the ICA as enacted in 1940 (except § 30(f), discussed below) provides for private damage actions, and the 1940 legislative history is equally devoid of support for such suits.

The language of § 36 is clear. It authorizes the SEC to commence actions to disqualify persons from future service with investment companies if they have engaged in "gross misconduct or gross abuse of trust" with respect to such companies. Section 36 does not prohibit or make unlawful any conduct,[14] nor does it speak in terms of any private rights, private suits, or money damages. Indeed, the only provision of the ICA as enacted in 1940 that expressly sets forth a private right of action is § 30(f), providing for recovery of short-swing trading profits, and its presence underscores the fact that "when Congress wished to provide

13. The amended supplemental complaint filed herein in 1973 invoked §§ 1(b)(2), 10, 17(e)(1), 17(h), 17(i), 36, and 37 of the ICA. Neither *Fogel I* nor *Fogel II* premised liability on any of these provisions, although, as explained in the text, the former pointed to § 36 and the latter to § 1(b)(2). At no point in this litigation has it been suggested that the failure adequately to disclose the possibility of recapture to the unaffiliated directors was tantamount to unlawful acceptance of compensation under § 17(e)(1) or to larceny, embezzlement, or unlawful conversion prohibited by § 37. Nor has it been shown that there has been any failure to comply with § 10, which deals with the composition of investment company boards of directors, or with the limitations under § 17(h) and 17(i) on indemnification of directors and investment advisers. Such provisions are set forth in the statutory addendum hereto.

14. When this Court has implied private rights of action, it has generally done so under provisions declaring specified conduct unlawful. *See, e.g.*, Superintendent of Insurance v. Bankers Life & Casualty Co., 404 U.S. 6 (1971); J. I. Case Co. v. Borak, 377 U.S. 426 (1964). *Cf., Cannon, supra*, 441 U.S. at 692, n.13.

a private damages remedy, it knew how to do so and did so expressly." *Touche Ross, supra*, 442 U.S. at 572, *quoted* with approval in *Transamerica, supra*, 444 U.S. at 21.[15]

Examination of the legislative history also makes it abundantly clear that Congress did not intend that a private right of action be implied under § 36. *See, Brouk* v. *Managed Funds, Inc.*, 286 F.2d 901, 911-912 (8th Cir. 1961), *vacated as moot*, 369 U.S. 424 (1962). The forerunner of what became § 36 was § 17(e) of the SEC's 1940 draft bill, which made unlawful "gross misconduct or gross abuse of trust in respect of an investment company" by affiliated individuals or underwriters.[16] This provision generated heated controversy, and a compromise was drafted which became, in modified form, §§ 36 and 37 of the ICA. In reviewing that proposal before the Senate subcommittee, David Schenker, Chief Counsel to the SEC for its study of investment trusts, stated:

> "We have incorporated a provision which gives the Commission the right to institute an action to get an injunction where the officers and directors and their affiliated persons are guilty of gross abuse of trust or gross misconduct—section 36, 'Injunctions against gross abuse.' In that case the Commission goes to court; and the person will have a right to have his case passed on by a court."

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15. In their briefs below, respondents placed heavy emphasis on the jurisdictional provision of the ICA, § 44, 15 U.S.C. § 80a-43, because it affords jurisdiction over "actions at law" which were unavailable to the SEC under the 1940 ICA. The court below properly ignored this claim, since the wording applies to actions to recover short-swing profits under § 30(f). More importantly, this Court in *Touche Ross* rejected a similar argument based on the jurisdictional provision of the 1934 Act, § 27, 15 U.S.C. § 78aa. *See*, 442 U.S. at 577.

16. Section 17(e) of S. 3580 read as follows:

> "Any gross misconduct or gross abuse of trust in respect of a registered company, on the part of any person registered under section 9 as an affiliated person of or principal underwriter for such company, shall be unlawful."

S. 3580 (Wagner-Lea Bill), 76th Cong., 3d Sess. (1940).

U.S. Senate, Subcommittee on Banking and Currency, Hearings on S. 3580, 76th Cong., 3d Sess., at 1120 (1940).[17] The House and Senate Reports accompanying the bill which eventually passed each explained that only the SEC could sue in federal court under § 36.[18] More importantly, the Senate Report made it clear that Congress intended the four corners of the legislation to provide the exclusive means of enforcing the duties which the ICA established:

> "The bill contains ample provisions, but appropriately circumscribed, for the enforcement of its provisions, for the carrying out of the powers and duties vested in the Commission, and for court review of the Commission's action. (secs. 38 to 46, 49)."

Senate Rep. No. 1775, to accompany S. 4108, 76th Cong., 3d Sess. at 20 (1940).

Congress, having enacted "ample . . . but appropriately circumscribed" provisions to enforce the ICA, hardly omitted a private cause of action in a fit of absentmindedness. *Transamerica, supra*, 444 U.S. at 20, *citing Cannon, supra*, 441 U.S. at 742 (Powell, J., dissenting). *See also, Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 453 U.S. 1, 14-15 (1981). Significantly, this Court has already held that there was a similar absence of congressional intent to create an implied private right of action under the Investment Advisers Act. *Transamerica, supra*, 444 U.S. at 18. That case is particularly persuasive here, for as this Court has noted, the Investment Advisers Act and the ICA were enacted together. *Id.*, at 20-22.

17. *See also*, U.S. House of Representatives, Subcommittee of the Committee on Interstate and Foreign Commerce, *Hearings on H.R. 10065*, 76th Cong., 3d Sess. at 98. (1940).

18. See House Rep. No. 2639, to accompany H.R. 10065, 76th Cong., 3d Sess. at 26 (1940); Senate Rep. No. 1775, to accompany S. 4108, 76th Cong., 3d Sess. at 20 (1940).

It is impossible to conclude that Congress had two different legislative intentions as to two statutes enacted simultaneously as parts of an integrated piece of legislation.[19]

Finally, § 36 was revised by Congress during the pendency of this case to expand the SEC's power to obtain injunctive relief and to create, for the first time other than in § 30(f), a circumscribed, express private right of action. Investment Company Amendments Act of 1970, Pub. L. 91-547, § 20, 84 Stat. 1413, 1428. Section 36, as amended, became § 36(a). That subsection allows the SEC to seek disqualification on the basis of "breach of fiduciary duty involving personal misconduct" and to obtain as well "such other injunctive or other relief . . . as may be . . . appropriate."

The new § 36(b), which added an express private right of action to recover for breach of fiduciary duty in respect of an advisor's compensation or payments, was prospective only and then did not take effect until June 14, 1972, eighteen months after enactment. *See*, Pub. L. 91-547, § 30(4), 84 Stat. at 1436. Congress carefully circumscribed this new cause of action with detailed provisions concerning burden of proof, approval of compensation by the fund's board of directors, strict limitations on the measure of damages, and a short statute of limitations. As the court below recognized, the present action is not governed by § 36(b), (A.21). But that does not mean that § 36(b) is irrelevant. The legislative history of the 1970 Amendments is at best ambiguous on the question of Congressional intent with respect to the implication of private rights of action under § 36(a).[20]

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19. *I.e.*, as Titles I ("Investment Companies") and II ("Investment Advisers") of 76th Cong., 3d. Sess., ch. 686, 54 Stat. 789. *Transamerica* held that there exists a limited private remedy under § 215 of the Investment Advisers Act to void an investment advisor's contract "but that the Act confers no other private causes of action, legal or equitable." 444 U.S. at 24.

20. There is language in the House Report accompanying the 1970 Amendments observing that shareholders could bring private actions under § 36 challenging investment advisory fees, H.R. Rep. No. 91-1382, 91st Cong., 2d Sess. at 7 (1970); Senate Report 91-184, 91st Cong., 1st Sess. (1969), contained no such acknowledgement. In hearings both chambers were apprised, *inter alia*, of the Eighth Circuit's decision in Brouk v. Managed Funds, Inc., 286 F.2d 901 (8th Cir.

Accordingly, the significance of the 1970 amendment of § 36 must be discerned primarily from the language of the statute. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 412 n.29 (1971); C. Sands, Statutes and Statutory Construction § 48.01 (4th ed. 1973) ("[w]here legislative history is itself ambiguous, a court must look to intrinsic aids"). In any event, there is nothing in that legislative history which compares with the kind of "affirmative intent" to preserve a private cause of action known to and approved by Congress when it comprehensively revised the Commodity Exchange Act. *Curran, supra*, slip op. at p. 33.

Congress never intended to allow those in respondents' position to pursue an implied private right of action under the ICA. Moreover, no such implied right under § 36 could exist side by side with the new provisions of § 36(b) without creating a distorted remedial scheme. *See, Touche Ross, supra*, 442 U.S. at 574; *Ernst & Ernst*, 425 U.S. at 207-10 (1976); *Blue Chip Stamps, supra*, 421 U.S. at 735-36. If the court below had faithfully applied the decisions of this Court, it could have reached no other conclusion.

C. The Inadequacy Of The "Nose Count" Of Prior Cases Which The Court Below Relied Upon To Bolster The Conclusion That It Was Proper To Imply A Private Right Of Action Under The ICA.

In assessing the significance of *Transamerica* to the issue of whether a private right of action should be implied under the ICA, the court below resorted to a "nose count" of earlier court of

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1961), *vacated as moot*, 369 U.S. 424 (1962), which held that there was no private of action under the ICA. *See*, testimony of Professor Richard Jennings in *Investment Company Amendments Act of 1967: Hearings on H.R. 9510 and H.R. 9511 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 1st Sess. at 636 (1967), and in *Mutual Fund Legislation of 1967: Hearings on S. 1659 Before the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. at 711 (1967). More important, *both* the House and Senate Reports instructed that "the fact that subsection (b) [of amended § 36] specifically provides for a private right of action *should not be read by implication to affect subsection (a)*." *Id.*, at 38 (House); S.Rep. No. 91-184, 91st Cong., 1st Sess. (1969) at 16 (emphasis added).

appeals decisions in an apparent effort to suggest that such private rights were so well-recognized by 1975 that it would be anomalous now to deny that they existed. This Court has followed such an approach only in the narrow context of actions brought under § 10(b) of the 1934 Act, see, *Touche Ross, supra*, 442 U.S. at 577-578, n. 19, *Cannon, supra*, 441 U.S. at 692 n. 13, and it is inapplicable here.

The court below stated that four courts of appeals—the First, Second, Third, and Tenth—had upheld private suits for damages for violation of the ICA. This total is, as Judge Friendly himself acknowledged (A.17-19), far less impressive than the longstanding recognition by ten circuits of a private right of action under § 10(b) of the 1934 Act which this Court accepted in *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6 (1971).

Beyond that, however, the court's treatment bypasses the existing conflict among the circuits on the issue of implying rights of action under the ICA. This Court has expressly recognized the conflict, *Burks, supra*, 441 U.S. at 476 n. 5, although it did not there resolve it. Indeed, in 1962, Judge Friendly recognized that the Second Circuit's view conflicted with the Eighth Circuit's 1961 *Brouk* decision. *See, Ackert* v. *Bryan*, 299 F.2d 65, 71-74 (2d Cir. 1962) (Friendly, J. dissenting).[21]

That conflict still exists, and this Court should now resolve it.[22] But, Judge Friendly suggested below that the conflict no longer

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21. It was because of that conflict that Judge Friendly dissented from a transfer by a district court in the Second Circuit to a district court in the Eighth Circuit: "I cannot understand how it can be thought to be 'in the interests of justice' to remit a plaintiff asserting a claim which we have held to be conferred by a Federal statute, Brown v. Bullock, 294 F.2d 415 (2d Cir. 1961), to a district where, at the very least, he will encounter the maximum difficulty in getting it heard." 299 F.2d at 73-74.

22. There are more than $240 billion presently invested in mutual funds governed by the ICA. N.Y. Times, April 29, 1982, § D (Business) at 12, Col. 4. At a recent continuing legal education seminar, "1982 Mutual Funds and Investment Management Conference," sponsored by the Federal Bar Association and Commerce Clearing House Inc., one speaker presented an analysis showing that nearly twenty private actions purporting to assert claims under various sections of the ICA which do

exists since a *dictum* in *Greater Iowa Corp.* v. *McLendon*, 378 F.2d 783, 793 (8th Cir. 1967), indicates a contrary view. (A.18). The *dictum* in *Greater Iowa*, however, rested solely on *Borak, supra*, and on the Eighth Circuit's then perception that this Court was "strongly in favor of courts implying private civil remedies where none are expressed." *Greater Iowa, supra*, 378 F.2d at 793. Nothing of the sort could be said by any lower court conversant with this Court's recent decisions.[23]

In any event, given this Court's emphasis on the need to specify precise statutory provisions as a basis for implying a private right of action (*see*, Part I.A., *supra*), any "nose count" of prior case law must focus on decisions based on the same statutory provision and the same type of alleged violation if it is to have any probative value. The court below could not do that because it was either unable or unwilling to point to any particular provision of the ICA as a basis for petitioners' alleged duty and respondents' implied right of action, and because, if the statutory basis was § 36, its "nose count" could include only *Moses* v. *Burgin*, 445 F.2d 369 (1st Cir. 1971), *cert. denied*, 404 U.S. 994 (1971), Second Circuit cases,[24] and the Eighth Circuit's conflicting holding in *Brouk*, as appropriate authority.

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not expressly provide for private rights of action are currently pending in the lower federal courts. A copy of the table presenting this analysis has been lodged with the clerk of this Court.

23. Similarly, the only Third and Tenth Circuit cases cited by the court below in support of its holding are far from unqualified endorsements of implied private rights under the ICA. A careful reading of Taussig v. Wellington Fund, Inc., 313 F.2d 472 (3d Cir.) *cert. denied*, 374 U.S. 806(1963), in which the court expressly noted the conflict between the Second Circuit and the Eighth Circuit's decision in *Brouk* and concluded that "it is legally debatable whether the right which plaintiffs assert can properly be derived from" the ICA, *id.*, at 476, and of the Tenth Circuit's decision in Esplin v. Hirschi, 402 F.2d 94 (1968), *cert. denied*, 394 U.S. 928(1969), which was grounded on the assumption that "when given the opportunity, the Supreme Court following the policy announced in J. I. Case Co. v. Borak, . . . will find an implied civil liability arising from the" ICA, *id.*, at 103, shows that neither case would likely be decided the same way today.

24. Even those cases were not precisely on point. In 1961 in *Brown* v. *Bullock*, *supra*—heavily relied upon by the court below—the Second Circuit *declined* to hold that a private action could be implied under § 36. 294 F.2d at 417-18. Rosenfeld v. Black, 445 F.2d 1337, 1348 (2d

The analysis of the court below is keyed to judicial doctrines and techniques that this Court has discarded in its recent decisions. This Court should not permit imposition against four individuals and the privately owned corporation of which they are the principal stockholders of a $4 million judgment premised on an analysis fundamentally at odds with those decisions.

II.

DECISIONS OF THIS COURT REQUIRE THE FEDERAL COURTS TO APPLY THE LAW AS IT EXISTS AT THE TIME OF DECISION, AND THE COURT BELOW FAILED TO DO SO.

This case has been actively litigated for fourteen years. Precisely at the midpoint of its lifespan this Court decided *Cort* v. *Ash, supra,* which was the cornerstone of a line of cases requiring intense scrutiny of Congressional intent with respect to every claim by a plaintiff that he has an implied private right of action under a federal statute.

The complaint herein was filed in July 1968. Petitioners clearly raised the issue of whether respondents could pursue a private right of action under the ICA in their answer. (*See*, A.150). This legal issue was understandably not listed in the 1973 pretrial order as one to be tried to the finder of fa[illegible]. Having prevailed on the liability issue in the district court, petitioners did not raise the issue on appeal. Indeed, given this Court's decision in *J.I. Case Co.* v. *Borak, supra*, and the Second Circuit's early cases favoring implied rights of action under the ICA,[25] it must have appeared futile to make the argument.

Although petitioners sought interlocutory review in this Court following *Fogel I*, their petition for certiorari—which did argue *Cort* v. *Ash*—was denied. *Chestnutt Corp.* v. *Fogel*, 429 U.S. 824 (1976). The Second Circuit's reversal on the liability issue

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Cir. 1971), *cert. dismissed sub nom., Lazard Freres and Co.* v. *Rosenfeld*, 409 U.S. 802 (1972), also cited below, can at best be viewed as upholding an implied private action for equitable relief under § 36.

25. *See, e.g., Brown* v. *Bullock, supra; Rosenfeld* v. *Black, supra.*

in *Fogel I* included a remand limited to damage issues. (A.121). The damage proceedings were not concluded until the district court reviewed the parties' objections to the magistrate's findings and issued its decision of June 19, 1980, increasing damages from the $349,013.04 (plus interest) to a total of nearly $4 million.

By that time, of course, this Court had expanded upon the change in the law first embodied in *Cort* v. *Ash*. Petitioners' primary argument below was that there was no implied right of action under the ICA. The court below rejected the argument that this Court's decisions compelled the conclusion that there was no private right of action under the ICA. See, Part I, *supra*. However, in true "Catch 22" fashion, it also concluded that it had discretion to avoid thorough consideration of that issue because of either waiver *via* failure to list it in the 1973 pretrial order or the law of the case doctrine.

While we disagree strongly with the reasons which the court below offered for applying those principles to preclude a full analysis of the issue,[26] our point here is simpler. Under settled law, the court below had no such discretion. It is certainly true, as the court below stated (A.15, 21-22 n.13), that none of this Court's recent decisions specifically held that there was *not* a private right of action under the ICA, but it was error to deny that both fundamental fairness, *see, Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976), and this Court's decisions holding that courts are bound to apply the law that exists at the time of decision mandated a thorough re-examination of whether it is proper to imply a private right of action under the ICA.

At least since *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801), this Court has held that "if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." *See also, Thorpe* v. *Housing Authority of Durham, supra*, 393 U.S. at 281-82 ("an appellate court must apply the law in effect at the time it renders its decision" and the rule is applied "where the change [in the

26. *See*, n. 10, p. 7, *supra* .

law] was constitutional, statutory or judicial"). That principle was expressly reaffirmed in *Cort* v. *Ash, supra*, 422 U.S. at 76-77 and in *Bradley* v. *Richmond School Board, supra*, 416 U.S. at 711-16, both of which were cited to the court below. The court, however, made no mention of these cases, and offered no explanation why they did not relieve petitioners of the alleged waiver and of the law of the case doctrine. This omission was particularly inappropriate in view of the court's concession "that the question of the existence of a private cause of action under the ICA has become more debatable than we or the [petitioners] thought in 1975" (A.21), and of its recognition that "only time will tell" whether or not the *Transamerica* holding under the Investment Advisers Act will be extended to preclude implied rights of action under the ICA. (A.22, n. 13).[27]

In the circumstances of this case petitioners are entitled to full consideration and a reasoned decision of that issue before being compelled to pay a $4 million judgment. This Court itself has acknowledged that, since 1975, it has worked a fundamental and historic change in the legal standards for implying private rights of action. *Curran, supra*, slip op. at pp. 20-24. Under this Court's cases, those new standards should have been applied below.

27. Nor did the court below adequately explain why it did not follow established Second Circuit precedent that the law of the case doctrine should be given only limited application "where the ruling in question involves the threshold determination of whether the plaintiff possesses a cause of action." Crane Co. v. American Standard, Inc., 603 F.2d 244, 248 (2d Cir. 1979) (footnote omitted).

III.

ALTHOUGH DECISIONS OF THE LOWER COURTS AND OF THIS COURT CONFLICT, ALMOST AT RANDOM, ON THE POINT, THE QUESTION OF WHETHER TO IMPLY A PRIVATE RIGHT OF ACTION UNDER A FEDERAL STATUTE SHOULD BE TREATED AS A JURISDICTIONAL ISSUE THAT MUST BE FACED WHENEVER RAISED

Petitioners submit that the question of whether an implied private right of action exists under a federal statute is, in fact, an element of subject matter jurisdiction. Distinctions between the existence of "jurisdiction" and of a "cause of action" have been drawn in many different contexts. But this case demonstrates that determination of the existence of such a right should be considered an element of subject matter jurisdiction.

We start by acknowledging that, in a footnote in *Burks* v. *Lasker*, 441 U.S. 471 (1979)—an ICA case in which the parties chose not to litigate the question whether there was an implied private right of action—this Court stated that the "question whether a cause of action exists is not a question of jurisdiction, and therefore may be assumed without being decided." *Id.*, at 476, n.5.[28] This statement, while conclusory, is not conclusive of this issue.

This Court has itself treated such issues as jurisdictional. In *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445

28. In support, this Court in *Burks* offered a "Cf." citation to Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 279 (1977), and Bell v. Hood, 327 U.S. 678, 682 (1946). The court below, in contrast, relied on these cases as direct support for its holding that this issue was not jurisdictional. These cases are distinguishable. Neither of them turned upon whether the plaintiff was one of a class of persons legally authorized by Congress or the Constitution to invoke the subject matter jurisdiction of a federal court. Rather, both focused upon the status of the defendants. Each of the other cases cited by the court below as illuminating the purported distinction between jurisdiction and failure to state a claim, Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 71-72 (1978), Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951), and The Fair v. Kohler Die and Specialty Co., 228 U.S. 22 (1913), addressed the sufficiency of plaintiffs' allegations as pleaded rather than the existence of jurisdiction over the underlying claim.

U.S. 136 (1980), this Court held that the federal courts were without jurisdiction to adjudicate a private party's claim under the Records and Records Disposal Acts because there was no implied private right of action under these statutes. The Court stated that "[n]o provision of either Act . . . expressly confers a right of action on private parties . . . [and that no such] private right of action can be implied." *Id.* at 148. The Court left no doubt that this conclusion went to jurisdiction, rather than to whether plaintiffs had a cause of action: "Thus, regardless of whether Kissinger has violated the . . . Acts, Congress has not vested federal courts with jurisdiction to adjudicate that question upon suit by a private party." *Id.* at 149-150. *See also, University of California Regents* v. *Bakke*, 438 U.S. 265, 380 (1978) (White, J. dissenting) ("If in fact no private cause of action exists, this Court and the lower courts as well are without jurisdiction to consider respondent's Title VI claim"). *Cf., Bread Political Action Committee* v. *Federal Election Committee*, 102 S.Ct. 1235, 1238-40 (1982) (statute defining "three carefully chosen classes of persons" entitled to invoke expedited review procedures characterized as "jurisdictional" and read strictly because this Court does "not assume the maximum jurisdiction permitted by the Constitution, absent a clearer mandate from Congress").

Judge Friendly's opinion below dismissed the inconsistency between *Burks* and *Kissinger* by observing that *Kissinger* "shows only that the Supreme Court in using 'jurisdiction' language can make the same mistake for which it has repeatedly chided lower courts", and that "it is impossible that the Court intended by a mere stroke of the pen to obliterate a distinction that it had consistently drawn for many decades" (A.11). We submit, however, that any notion of a consistently drawn distinction between "jurisdictional" issues and questions concerning the implication of private rights of action is illusory. This Court, and the lower federal courts, have in fact used the language of "jurisdiction" in

a variety of contexts and with a variety of meanings. *Compare, Burks, with Kissinger, supra,* and *Bakke, supra* (dissenting opinion of White, J.).[29]

Nor are *Kissinger* and Justice White's dissent in *Bakke* the only authority for treating questions about the existence of an implied private right of action as jurisdictional. Lower courts—including the Second Circuit on a number of occasions prior to this one—have also so held. *Compare,* the decision below (A.7-12) *with, Taussig, supra,* 313 F.2d at 476 (3d Cir. 1963) ("to establish federal question jurisdiction over the present private civil suit . . . plaintiffs must argue that once [the ICA] has made it legally wrong for an investment company to adopt a name that is materially deceptive . . . , it is within the authority of a federal court to provide a civil remedy . . . even though the special remedy Congress has provided . . . is of a different character"); *Brouk, supra,* 286 F.2d at 906 (8th Cir. 1961) ("The absence of specific language [in the ICA] creating civil liability respecting private actions narrows the jurisdictional question presented by this appeal to whether or not directors' liability . . . has been created by implication"); *Brown v. Bullock,* 294 F.2d 415, 417 (2d Cir. 1961) (Friendly, J., issue of whether an implied right of action exists under the ICA heard on certification *en banc* because court believed "that determination *in limine* of the issue of Federal jurisdiction, an issue of first impression in this Circuit, was desirable in order to avoid a lengthy trial which would be futile if such jurisdiction did not exist"). *See also, International Controls Corp. v. Vesco,* 490 F.2d 1334, 1342 (2d Cir.), *cert. denied,* 417 U.S. 932 (1974); *Esplin v. Hirschi,* 402 F.2d 94, 103

29. Also, *compare* Bell v. Hood, *supra,* 327 U.S. at 682 ("[j]urisdiction, therefore, is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover"), *with,* City of Kenosha v. Bruno, 412 U.S. 507, 513 (1973) (since municipal corporations were "outside of [§ 1983's] ambit for purposes of equitable relief as well as for damages . . . District Court was therefore wrong in concluding that it had jurisdiction of appellees' complaints under § 1343"). *See also,* cases cited in n. 30, *infra.*

(10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969); *Ruckle v. Roto American Corp.*, 339 F.2d 24 (2d Cir. 1964); *Howard v. Furst*, 238 F.2d 790, 793 (2d Cir. 1956), *cert. denied*, 353 U.S. 937 (1957).[30]

Moreover, this Court has often treated analogous issues relating to congressional preconditions for access to, and limitations upon the powers of, the federal courts as jurisdictional. In *Sumner* v. *Mata*, 449 U.S. 539 (1981), this Court applied the statutory presumption of correctness of state court findings to vacate a court of appeals decision granting habeas corpus without explaining why that presumption, set forth in 28 U.S.C. § 2254(d), did not bar such action. In response to the prisoner's contention that the point had been abandoned by the state at the circuit court level, this Court held that the application of such statutory limitations raised a jurisdictional issue:

> "Whether or not the [state] specifically directed the Court of Appeals' attention to § 2254(d) makes no difference as to the outcome of this case. The present codification of the federal habeas statute is the successor to 'the first [C]ongressional grant of jurisdiction to the federal courts,' . . . and the 1966 amendments embodied in § 2254(d) were intended by Congress as limitations on the exercise of that jurisdiction. As we held in *Louisville & Nashville R. Co.* v. *Mottley*, 211 U.S. 149, 152 (1908), and have repeatedly since reaffirmed, 'it is the duty of this [C]ourt to see to it that the jurisdiction of the [district court], which is defined and limited by statute, is not exceeded.' Having had the benefit of the full briefing and argument from the parties on the § 2254(d) issue, we are simply following the well-established doctrine of the *Mottley* case in deciding [it]." *Id.*, 449 U.S. at 547-48, n.2.

30. The lower courts have also held, seemingly contrary to this Court's holdings in cases like *Bell v. Hood*, supra, that questions relating to the status of defendants are jurisdictional. *See, e.g.*, Blaze v. Moon, 440 F.2d 1348, 1349 (5th Cir. 1971); Gnotta v. United States, 415 F.2d 1271, 1277 (8th Cir. 1969), *cert. denied*, 397 U.S. 934 (1970).

See also, Brown v. *General Services Administration*, 425 U.S. 820, 831-35 (1976) (applying statutory preconditions to bar plaintiffs' federal court action asserting a claim of unlawful discrimination in federal employment).

Viewed against this backdrop, *Burks* merely suggests an approach where the issue of whether there is an implied right of action has not been raised by the parties.[31] The *Burks* footnote does not, however, impose an inflexible rule that such issues are waived if not raised or pressed throughout the course of a lawsuit. In *Curran, supra*, this Court and the Sixth Circuit so treated *Burks*, since—in marked contrast to the court in the instant case—each opinion addressed the implied private right of action issue even though it had never been raised below.[32]

Because of the considerable uncertainty about whether issues relating to the existence of implied private rights are jurisdictional, this Court should grant certiorari to resolve the point once and for all. It is particularly appropriate to do so in this case because it was pending long before this Court, mindful of the "increased complexity of federal legislation and the increased volume of federal litigation," *Curran, supra*, slip op. at p. 23 (footnote omitted), dramatically changed the analytical approach to the question of implication. This case and all others like it now pending in the federal courts should be treated consistently under that new approach.

Although the narrow definition of "jurisdictional" issues adopted below is inappropriate, acceptance of the distinction between the existence of "jurisdiction" and of a "cause of action" does not mean that the issue presented here—whether an implied private right of action exists—should not be treated as the procedural equivalent of a jurisdictional issue. In other words, as a policy matter there is much to recommend a rule that the question

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31. Justice White's observation in *Bakke, supra*, that "this is surely not the first instance in which the Court has bypassed a jurisdictional problem not presented by the parties", 438 U.S. at 380 n.1, is also pertinent to *Burks*.

32. Indeed, the Sixth Circuit specifically noted that, in view of this fact, "the decision in *Burks* offers a tempting invitation to bypass the issue." 622 F.2d at 230-231 n.20.

of whether an implied right action exists should be litigable at all times or subject to *sua sponte* consideration by a federal court. Both "jurisdiction" and "cause of action" questions are issues of law, and both invoke identical concerns respecting the proper role of the federal judiciary and due respect for congressional prerogatives.

In *Davis* v. *Passman*, 442 U.S. 228 (1979), this Court both drew the distinction and illustrated the identity of the concerns: "*jurisdiction* is a question of whether a federal court has the power, under the Constitution or laws of the United States, to hear a case . . . [whereas] *cause of action* is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court." *Id.*, at 239-240 n.18. The Court went on to find an implied private right of action based on a constitutional claim; thus, it had no occasion to decide whether the federal courts would have had jurisdiction had the result been otherwise. Significantly, however, *Davis* did stress the importance of congressional intent in implication cases involving statutes, stating that "the question of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that is protected by the Constitution" and that *"[s]tatutory rights* and obligations *are established by Congress, and it is entirely appropriate for Congress, in creating these rights* and obligations, *to determine in addition who may enforce them* and in what manner." *Id.*, at 241 (emphasis added).

The lower federal courts have no source of judicial authority apart from what has been conferred by the Constitution and the Congress. U.S. Const. Art. III. Created by Congress, such courts may act only in the manner and to the extent prescribed by Congress. *United States* v. *More*, 7 U.S. (3 Cranch) 159, 172 (1805). Litigants thus owe their access to the federal courts—at least in those cases that arise under a federal statute rather than under the Constitution—solely to congressional mandate. If a federal court hears a claim that is outside its subject matter jurisdiction it is acting *ultra vires* and is effectively seizing for

itself a prerogative placed with Congress by the Constitution itself. The same would be true, we submit, if a federal court entertained a claim by one whom Congress had not chosen to include as a proper plaintiff to enforce a given federal statutory right.

These concerns have resulted in strict compliance with the limited jurisdiction of the federal courts. *Sheldon* v. *Sill*, 49 U.S. (8 How.) 441 (1850). As noted in *Turner* v. *Bank of North America*, 4 U.S. (4 Dall.) 8, 10 n. (1799) "... the disposal of the judicial power (except in a few specified instances) belongs to congress. If congress has given the power to this court, we possess it, not otherwise: and if congress has not given the power to us, or to any other court, it still remains at the legislative disposal." *See also Carlson* v. *Green*, 446 U.S. 14, 37 (1980) (Rehnquist, J., dissenting).

The identical concerns undergird the procedural rule that subject matter jurisdiction cannot be waived. *United States* v. *Griffin*, 303 U.S. 226, 229 (1938); *Mitchell* v. *Maurer*, 293 U.S. 237 (1934). Even if neither party to a suit raises the issue of the sufficiency of federal subject matter jurisdiction, a court may—and some decisions hold that it must—raise it *sua sponte*. *City of Kenosha* v. *Bruno*, 412 U.S. 507, 513 (1973); *Louisville and Nashville R.R. Co.* v. *Mottley*, 211 U.S. 149, 152 (1908).

Thus, the existence of an implied private right of action—if it is not formally considered an element of subject matter jurisdiction—should be viewed as procedurally analogous to a jurisdictional issue because, if a court does not face such an issue, it runs the identical risk of usurping functions vested in Congress. Such a question, like a jurisdictional one, should not be subject to waiver by consent or inadvertence of the parties. Rather, it ought to be treated as an issue that may be raised at any time by the parties or by a court.

It may be argued that implication of private rights of action merely involves the traditional judicial function of fashioning remedies to vindicate established rights. But this accepted principle cannot properly bar consideration of whether a private right

of action should be implied in a particular case. To do so merely begs the central question, *i.e.*, whether there is in fact a pre-existing "legal right." In the context of implied private rights of action, the first question that must be faced is not whether an appropriate remedy may be fashioned, but whether Congress intended to confer *any* rights upon the particular plaintiff who is attempting to vindicate his claims in a federal court.

This Court's recent decisions in the area of preemption of federal common law by Congress further illustrate the obligation of the federal courts to confine their activities to coincide with congressional intent. In *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981), for example, this Court held that the Federal Water Pollution Control Act preempted the federal common law of nuisance in interstate waters. The Court noted that "[o]ur 'commitment to the separation of powers is too fundamental' to . . . rely on federal common law 'by judicially decreeing what accords with "common sense and the public weal" ' when Congress has addressed the problem." 451 U.S. at 315 (citing *TVA* v. *Hill*, 437 U.S. 153, 195 (1978)). Just as federal courts are prohibited from developing standards of decision where Congress has spoken to an issue, they are precluded from granting access to classes of litigants whose claims do not fall within those contemplated by Congress. *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 453 U.S. 1, 13-18 (1981). Denial of access to such litigants is not simply a matter of administrative convenience. To hear such cases would be to do violence to the notion that federal courts are courts of limited jurisdiction. *Id.*, at 18 (where "Congress has made clear that implied private actions are not contemplated, the courts are not authorized to ignore this legislative judgment"). *Cf.*, *TVA* v. *Hill*, 437 U.S. 153, 194 (1978); *Diamond* v. *Chakrabarty*, 447 U.S. 303, 317 (1980); *United States* v. *Gilman*, 347 U.S. 507, 511-513 (1954).

In sum, proper deference to the congressional authority to condition access to the federal courts should have led the court

below to conclude that the private right of action issue was jurisdictional, or that it was in all respects analogous to a jurisdictional issue. There is considerable confusion on this point, however, and this Court should grant certiorari to resolve it.

Conclusion

For the reasons stated herein, petitioners respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit.

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